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Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on the Bureau of Indian Affairs
And the Office of Special Trustee
Trust Reform and Reorganization

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Good Morning Chairman Pombo, Ranking Member Rahall, and members of the Committee. My name is Melanie Benjamin and I am the Chief Executive of the Mille Lacs Band of Ojibwe. The Mille Lacs Band is a federally-recognized tribe located in East Central Minnesota and has an enrollment of 3,602 members. The Mille Lacs Band was one of the first tribes to have entered into a self-governance compact with the United States government. It is our pleasure to provide testimony before the committee this morning on the Bureau of Indian Affairs (BIA) trust reform process from the perspective of a self-governance tribe. This morning I will talk briefly about early self-governance policy, the federal trust responsibility, and the interplay of the current BIA reform and reorganization as it relates to self-governance policy and practice.

Early Self-Governance Policy

The Mille Lacs Band of Ojibwe has struggled for many years under changing federal Indian policies. From the beginning of the Indian Self-Determination and Education Act of 1975, and with the shift to tribal governments operating federal programs, the Mille Lacs Band saw the importance of implementing these concepts. In the early 1980s, the Mille Lacs Band government implemented a new approach to dealing with these changing policies. Following a full review of the Band governmental structure, the Mille Lacs Band adopted a separation of powers governmental structure.

At the 200th anniversary of the signing of the United States Constitution, ten tribal leaders from across the United States recognized the importance of reviewing the tribal relationship with the United States government. Through a series of national tribal meetings in 1986 and 1987, it became clear that tribal governments prioritized the reestablishment of a government-to-government relationship with the United States, very much like the relationship in the treaty-making era. This new direction in federal Indian policy would treat tribal governments more like brothers with the United States, rather than children of the great white father.

At the request of Congress, tribes developed an improved framework and system that would better meet tribal needs at the local level. The Mille Lacs Band and several other tribal governments responded by developing the Tribal Self-Governance Demonstration Project, which Congress supported and subsequently adopted into federal law. Tribes understood this federal legislative action to mean that a more formal relationship would exist to discuss and improve issues for tribes and their reservations. In effect, tribes would be recognized as sovereign governments that could address their respective education, health, social, and economic needs. Implicit in this recognition of tribal self-determination and self-governance was that the new federal law would not diminish the treaty or trust obligations of the United States to the Indian tribes.

In 1990, the Mille Lacs Band of Ojibwe was one of the first tribes to participate in the Tribal Self-Governance Demonstration Project authorized by the Indian Self-Determination Act. We first compacted for thirty (30) programs from the BIA and today we are compacted for all authorized BIA programs through our Annual

Funding Agreement and provide direct services to our membership. We were likewise among the first tribes to negotiate a self-governance compact for programs in the Indian Health Service. As a general matter of policy, the Mille Lacs Band has always strongly advocated for the self-governance of all federally-supported Indian programs.

Federal Trust Responsibility

The United States' federal trust responsibility to Indian tribes has been established through our treaties with the United States, federal statutes, Executive Orders, Supreme Court decisions, and the general course of dealings with tribes. The federal trust responsibility extends from the United States a trust obligation to Indian tribes and further recognizes a unique government-to-government relationship between each federally-recognized tribe and the United States.

The federal trust responsibility has long been interpreted to be very broad in scope and is expressly acknowledged in self-governance laws whose policies strive to maintain, improve, and ensure the continuation of the United States' relationship with and responsibility to Indian tribes. These broad policies underlying the self-governance laws make clear Congress' intent in promoting tribal self-governance as one of the primary means to strengthen the federal trust responsibility to tribes.

The Tribal Self-Governance Act of 1994, Title IV to the Indian Self-Determination Act provides specific statutory protection for the trust responsibility in Sec. 403(b)(9) by prohibiting the Secretary from waiving, modifying, or diminishing the federal trust responsibility of the United States. Later, Congress reaffirmed its commitment to upholding the federal trust responsibility in the Tribal Self-Governance Amendments of 2000 to the Indian Self-Determination Act, by providing that "[t]he Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions." 25 U.S.C. § 458aaa-6. Clearly Congress intended to uphold its federal trust responsibility to and government-to-government relationship with self-governance tribes, a policy which has not been changed by further congressional action to date.

The BIA exists to advance tribal interests in broad federal Indian policy matters, and whose specific duty is to administer programs and services for the benefit of all federally-recognized tribes and their members. While self-governance tribes like the Mille Lacs Band believe we are better able to administer the same programs and services to our members, via our self-governance compacts, the fact remains that the BIA has a continuing obligation to advance tribal self-governance interests on par with those of all other tribes.

While the Mille Lacs Band and other self-governance tribes have assumed more authority and control over compacted programs, we must emphasize what the statute itself emphasizes: the federal trust responsibility of the United States continues to apply to all tribal resources and programs, not just those specific to trust resources or management of trust resources. Only on this condition, and based upon this understanding of the federal trust responsibility, has the Mille Lacs Band have chosen to enter into self-governance compacts in order to better serve our members.

Trust Reform and Reorganization Impacts to Self-Governance

Tribal Consultation

In November 2000, President Clinton signed Executive Order 13175 that indicated a federal commitment to tribal sovereignty and the formalizing of a government-to-government relationship between federally-recognized tribes and the United States. The policy of consultation and coordination with Indian tribal governments extended to all federal agencies. Where it concerns tribal consultation, the Executive Order provides the following:

Sec. 3. Policymaking Criteria. [A]gencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

...

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

- (2) where possible, defer to Indian tribes to establish standards; and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The trust reform process and reorganization seem to be in a perpetual state of motion as a result Cobell litigation. Initially, tribes were part of the process through a task force of which I was a member of. Although that task force attempted to develop a tribal solution, the Department of Interior suddenly dissolved the task force and proceeded with the trust reform process without any further tribal involvement. That action has since set the tone for the trust reform and reorganization as we see it playing out today, creating an atmosphere of distrust, sporadic paralysis, and uncertainty. Consequently, the Interior and BIA tribal consultation policy has become, with all due respect, meaningless to tribes who reasonably expect to have a voice in policy matters and decisions that affect us.

Although the BIA and the new Office of Special Trustee (OST) have conducted "consultation" sessions throughout Indian Country on the trust reform and reorganization, the sessions are more accurately characterized as informational updates that tell tribes what changes have been made (as the result of prior policy decisions) and their effects upon tribes. From the tribal perspective, if a "consultation" takes place after the fact of a major decision that directly affects tribal interests, it is not a consultation. At most, it is an informational briefing.

In many instances, federal notices to tribes for BIA and OST consultations have been so late that tribal attendance was abysmal. On one such occasion last fall, a consultation was scheduled for a handful of the BIA regions in the central United States. The Mille Lacs Band was just about the only tribe in attendance out of the entire Midwest region. One has to ask what meaning tribal consultation has if most of the affected tribes cannot be present to receive any information.

This lack of meaningful tribal consultation is illustrative of the mixed messages that come from Interior and the BIA. On one hand, we are told that the BIA wants to work with tribes. On the other hand, the Department is overhauling an entire agency, and creating a new one in the process, without working with tribes at all.

Where it concerns the BIA's management of trust resources, the Cobell litigation has shown that the Interior and BIA have failed to properly manage resources held in trust for tribes. It is ironic that tribes are being asked to blindly trust Interior and BIA decisions on how to repair the damage to trust assets when the original damage was caused by Interior and the BIA. It makes no sense at all, unless the policies of federal paternalism have returned to replace tribal self-determination and self-governance.

The Office of the Special Trustee

The Mille Lacs Band first points out that Congress never intended for the Office of Special Trustee (OST) to be a permanently-funded operational program. The OST was initially authorized by the American Indian Trust Fund Management Reform Act of 1994 (Public Law 103-412) as an oversight body that would oversee and coordinate departmental reforms. Today, the OST is assuming all trust functions and will administer a number of programs. It is from this that the OST has drawn its statutory authority, and the expansion of OST duties and responsibilities is being created through administrative rather than legislative action.

Despite this lack of congressional authority, a major component of the latest trust reform effort is based on a transfer of many BIA functions to the Office of Special Trustee. In the opinion of many tribes, this transfer of functions to a new agency with new duties and responsibilities amounts to a quick fix to a long-standing problem within Interior and the BIA that is taking place too quickly for any real effective change to occur. It is the further opinion of many tribes that this is why tribal involvement was removed from the process, so that the Department could implement its changes as quickly as possible to satisfy the Cobell sanctions imposed through court orders.

Caution must be considered with this latest BIA reorganization. History tells us that the latest trust reform and reorganization proposal is the most recent in a long line of failed proposals. Dozens of reorganization plans have been unfurled with great fanfare over the years and countless millions of dollars have been consumed studying and procuring and preparing them. None have been implemented with any measure of success. None. No one has considered that it may be the tribal beneficiaries themselves who may ultimately develop a successful solution to the trust mismanagement problem. This would be consistent with the

premise of tribal self-governance – that those who govern best are those who govern closest to the people most affected.

One concern to the Mille Lacs Band and other tribes is that the transfer of functions proposed by the Department also appears to be limiting the scope of the trust responsibility to more limited duties and to promoting paternalistic policies. An example of this is the fee-to-trust land acquisition of tribes. Land acquisition is a major objective for many tribes, yet under the trust reform process there is a distinction between tribal fee lands and trust lands. The problem is that until a piece of tribal land acquires trust status, it would not fall under the OST's responsibilities and its treatment as a trust resource is very questionable.

Placing tribal lands into trust has become very difficult for tribes in recent years, and so there is a growing concern for the Mille Lacs Band and other tribes that Interior is working to minimize its overall trust responsibility to tribes (i.e., less trust resources to manage means less trust responsibility to that resource and its beneficiary). The net effect of separating fee lands and trust lands between the BIA and OST is that tribal priorities of land acquisition and increased self-governance of those lands is undermined and generally not being supported by the very agencies charged with acting in our best interests.

A second concern to the Mille Lacs Band concerns the proposed Integrated Data System which the OST is relying upon as the basis for this entire trust reform process, a system that the Mille Lacs Band and other self-governance tribes will not have access too. The OST officials have told compacted and contracted tribes that we do not have to adopt the proposed model, but that doing so will ensure access to the system and the information within that system. A recommendation of this sort requiring self-governance and contracting tribes to adopt a system in order to have information access undermines self-determination policies and promotes a paternalistic policy that leaves tribes with no choice in data information access. Surely the technical capacity is available for a variety of tribal models and approaches that can create access to the data.

A third concern for the Mille Lacs Band is the fact that our Annual Funding Agreements are with the BIA and not the OST. We have questions whether our access to funding will be impacted if a program used to be under the BIA but is now in the OST. This issue has not been addressed by either the BIA or OST, and consequently self-governance tribes face uncertainty as to the terms of our funding agreements when a program has been transferred to the OST.

Related to the matter of our funding agreements is that Central Office funds have been withheld from our Annual Funding Agreements, a therefore self-governance tribes will not be able to participate in the trust reform efforts insofar as they involve an expansion of funding for Central Office programs, functions, services, and activities. These problems raise questions about the trust reform's effect upon the self-governance process as a whole. Again, the issue is not being directly addressed.

A fourth concern for the Mille Lacs Band and other self-governance tribes is that we want the option to compact with the OST in light of the repeated messages that changes made under trust reform will continue to move forward and will remain so. If true, self-governance policy must remain consistent and authorize tribes to compact for the same programs that were once in the BIA but have been transferred to the OST. In this manner, self-governance policies and interests would be preserved rather than undermined.

With these examples illustrating specific problems for self-governance tribes, the Mille Lacs Band seriously questions what measure of federal trust responsibility can be expected from a new departmental agency with our trust resources and assets under our self-governance compacts. Because these issues, and others, have not adequately been addressed by the BIA and OST, self-governance tribes have come to believe this latest trust reform process is bypassing our particular concerns and interests as changes continue to be implemented.

Conclusion

Self-governance policies and laws were designed to move the United States government away from paternalistic policies and practices in the administration of Indian programs. Today, self-governance is being dismantled by the changing processes under the ongoing trust reform and reorganization. Self-governance was designed to allow tribes to adapt to changes as they see fit, but the latest trust reform is imposing changes upon tribes that we are told we must live with. Such a policy from within the Department of Interior is not consistent with self-determination or self-governance and the reorganization is removing tribal participation out of the entire trust reform process.

If the BIA and OST were serious about wanting to work with tribes, our concerns would be given consideration prior to a decision, not after the fact. Working with us would result in tribes gaining increased authority to compact for more programs. Instead, we are frequently told that certain programs are not compactable due to their status as an untouchable, inherently federal function. As stated earlier, the Mille Lacs Band strives to compact all of our federal dollars for all programs. Increased authority to compact additional programs would allow us to work towards that goal.

The Mille Lacs Band and other self-governance tribes continue to assert that we are willing to work together and assist with the trust reform process. Tribes must be part of the solution that addresses the problem involving our interests. Until then, the paternalistic actions and policies that are evolving under the current reorganization plan are moving tribal self-governance in a direction that Congress did not envision when it enacted self-governance.

Further, any administrative action taken to limit the federal trust responsibility of the Department of Interior as part of the trust reform process is also inconsistent with existing federal Indian laws and policies that define that responsibility, which the Mille Lacs Band would assert amounts to a significant diminishment of the federal trust responsibility in effect.

On behalf of the Mille Lacs Band of Ojibwe, thank you for your consideration.

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